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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. 708

SIDNEY S. GRANT,
Respondent,

against

THE READER'S DIGEST ASSOCIATION, INC.,
Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

OSMOND K. FRAENKEL,
Attorney for Respondent.

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Respondent respectfully urges this Court to deny the application for a writ of certiorari. There is no merit to petitioner's contention that the Circuit Court of Appeals for the Second Circuit decided an important question of local law in conflict with applicable local decisions, nor is there any merit to the contention that the decision below would circumscribe freedom of the press.

So far as this latter contention is concerned, it should be pointed out that no such contention was made by petitioner in either of the courts below. Moreover, it has long been recognized that the law of libel constitutes an exception to that freedom granted to the press by the Constitution. There may, of course, be situations in which a claim under the libel laws would, if sustained, constitute a serious interference with liberty of the press. Such a situation

was indeed presented to this Court in the *Sweeney* case where this Court affirmed by an equally divided vote (316 U. S. 642). No such question is, we submit, presented in the case at bar. The essential difference, of course, is that Sweeney was a member of Congress. It is in the public interest that the widest possible comment be permitted with regard to the conduct of members of Congress. For the same reason free comment has been permitted by the New York courts with regard to the conduct of candidates for public office. See, for instance, *Duffy* v. *New York Evening Post*, 109 App. Div. 471. Cf. *Hall* v. *Binghamton Press Co.*, 263 App. Div. 403.

In the case at bar plaintiff is an ordinary citizen, neither a candidate for, nor a holder of public office. There is no reason why the ordinary rules of libel should not be applied here. No public interest is involved, no basis for any claim of interference with freedom of the press.

There is also no basis for the aspersions cast by petitioner upon the opinion of Judge Learned Hand. We see no occasion for dealing with that opinion in detail. It is obvious, however, that it rests primarily upon the cases of *Katapodis* v. *Brooklyn Spectator, Inc.*, 287 N. Y. 17, and *Balabanoff* v. *Hearst Consolidated Publications*, 294 N. Y. 351. In both of those cases the New York Court of Appeals reached the same conclusion as was reached here by the Circuit Court of Appeals, namely, that where there is any doubt about the meaning or application of words charged to be libelous that doubt must be resolved at a trial by a jury and cannot be disposed of on motion by a judge. That in essence is the decision here. It is in strict conformity with New York law. It should not be disturbed.

The suggestion in the petition (p. 9) that the Circuit Court of Appeals applied one rule in the *Sweeney* case (122 Fed. 288) and a different rule in the case at bar, ignores the fact that the *Katapodis* decision of the New York Court of Appeals had not yet been rendered at the time of the decision in the *Sweeney* case by the Circuit Court of Appeals. Moreover, in the *Sweeney* case the Cir-

cuit Court of Appeals denied the motion to dismiss on the basis of the *Kimmerle* case (262 N. Y. 99) and there was no need for going any further.

We submit, finally, that Judge Hand was correct in his belief that the New York Court of Appeals had expanded the law of libel in the *Katapodis* case. Certainly there is nothing in the opinion in that case to justify petitioner's statement in its brief (p. 16) that the *Kimmerle* case was recognized as authoritative in the *Katapodis* case, for Judge Laughlin merely cited the *Kimmerle* case in passing. It is significant also that counsel for both appellant and respondent in the *Katapodis* case relied on the *Kimmerle* case. The fact of the matter is that the decision in the *Katapodis* case does go a step beyond that reached in the earlier case. It is not, therefore, plainly consistent with that earlier case. It is wholly incorrect to say, as petitioner does (p. 16), that it has been so regarded by subsequent New York cases. Four cases are cited. The significant fact, however, is that in each of these cases the motion to dismiss the complaint was denied on the ground that it was for the jury to say whether the article complained of was libelous. Thus there was no occasion for the court in any of these cases to contrast the *Kimmerle* and the *Katapodis* cases. It is significant, moreover, that in two of these cases, *Neaton* v. *Lewis Apparel Stores*, 267 App. Div. 728, and *Lubliner* v. *Reinlib*, 184 Misc. 472, the *Kimmerle* case was not even mentioned. While it was mentioned in the other two cases it was not in any way contrasted with the *Katapodis* case.

Petitioner relies (p. 19) on the decisions in *Luotto* v. *Field*, 49 N. Y. Supp. (2nd) 785, and 268 App. Div. 227. It is true that there is some language in those decisions which might give petitioner comfort. However, the actual decision rendered at Special Term resulted in a denial of the motion to dismiss. It was this denial, and not any of the language used in either opinion, which was affirmed by the Court of Appeals. In any case, the nature of the statement complained of in that case is quite different from the nature of the statement complained of in the case at bar.

Finally, it should be noted that the Circuit Court of Appeals was fully justified in relying upon the decisions of the Appellate Division in the First Department, *Boudin* v. *Tishman*, 264 App. Div. 842 and *Hryhorijiv* v. *Winchell*, 180 Misc. 574, aff'd 267 App. Div. 817, if it believed that those decisions more truly reflected the views of the New York Court of Appeals than did this single decision in the Second Department.

It is, therefore, respectfully submitted that the application for a writ of certiorari should be denied, and the defendant required to answer and the case allowed to proceed to trial.

Respectfully submitted,

Osmond K. Fraenkel,
Attorney for Respondent.